

December 9, 2008

Fair Political Practices Commission
Mr. Ross Johnson, Chairman
428 J Street, Suite 620
Sacramento, CA 95814

RE: Opposition to FPPC Proposed Regulation 18521.5

Dear Chairman Johnson:

I write on behalf of Senate President Pro Tem Darrell Steinberg to oppose adoption of proposed Regulation 18521.5.

Regulation 18521.5 would prohibit state candidates from controlling general purpose ballot measure committees. As such the regulation is beyond the Commission's statutory authority and violates candidates' free speech and association rights under the U. S. Constitution.

I. Adoption of Proposed Regulation 18521.5 Exceeds the Commission's Statutory Authority

The Political Reform Act (Act) establishes contribution limits made to support the election of candidates to state elective office. To the extent that contributions are made for purposes other than supporting a state candidate's election to office, Government Code Section 85303(c) precludes the imposition of any limits on contributions. Section 85303(c) reads:

Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office.¹

¹ Contributions to state candidate controlled ballot committees are not "contributions" used for purposes of electing candidates to state office and are, therefore, not subject to limitation under Section 85303(c). (*Citizens to Save California v. FPPC* (2006) 145 Cal.App.4th 736, 750; *See also* 2 CCR §18215(c)(7).)

Section 85310 imposes special contribution limits and reporting requirements on payments for communications made within 45 days of an election that clearly identify candidates for elective state office, and that do not expressly advocate the election or defeat of the candidate. This narrow exception does not affect the statutory authority arguments raised in this section.

Lance H. Olson

Bruce J. Hagel

Diane M. Fishburn

Elizabeth L. Gade

Deborah B. Caplan

N. Eugene Hill

Richard C. Miadich

Richard R. Rios

Rebecca J. Olson

Under Regulation 18521.5, a candidate would be prohibited from controlling a general purpose ballot measure committee and may not establish or raise funds into a primarily formed ballot measure committee unless the candidate is the proponent of a measure or until after one of the following occurs: (1) a measure's proponent opens a committee to support a measure, (2) a measure is submitted to the Attorney General for title and summary, or (3) a measure qualifies for the ballot. (Regulation 18521.5(b) and (c).)

By imposing temporal restrictions on when a candidate may accept contributions to support or oppose ballot measures, Regulation 18521.5 imposes a limitation on contributions made for purposes other than supporting the election of candidates. These limitations are in violation of the express language of Section 85303(c).

Although not expressly stated, it appears that Regulation 18521.5 is an attempt by the Commission to accomplish indirectly what California courts have already said it cannot accomplish directly—that is, imposing restrictions on contributions to candidate controlled ballot measure committees.

In Citizens to Save California v. Fair Political Practices Commission (2006) 145 Cal.App.4th 736, 750, the Court invalidated Commission regulations which attempted to impose monetary limits on contributions to candidate controlled ballot measure committees. According to the Court, the regulations were

inconsistent with the legislative intent underlying the PRA's contribution limits. The effect of [the limitation] is to inhibit a candidate's involvement in the initiative process. Involvement will lead to restrictions on the ballot measure committee's fundraising. This conflicts with the voters' concern, as expressed in the ballot proposition, that candidates devote insufficient time to matters of public policy.

Moreover, the regulation limits the electorate's ability to work in tandem with elected officials to effectuate the electorate's public policy concerns, which undermines Proposition 34's purpose of providing individuals and interest groups with a fair and equitable opportunity to participate in the elective and governmental processes.

(Citizens to Save California, 145 Cal.App.4th at 751-752.)

While the restrictions imposed by Regulation 18521.5 on fundraising by candidate controlled ballot measure committees are different in character than the restrictions contained in the Commission's previous regulations, they are equally unsupported by the plain language and intent of the Political Reform Act. Establishment of temporal limitations – no less than monetary

limits – would significantly impact the ability of candidates to effectively participate in the policymaking process.

For example, a candidate could not participate as a board member of a general purpose committee established to support measures that improve the state's infrastructure or increase funding for education without imposing the temporal fundraising limitations applicable to candidate controlled ballot measure committees under the proposed regulation. This result is necessitated because the general purpose committee would become a "controlled committee" if the candidate, or his or her agents, directly or indirectly control the committee or exert significant influence over it. (Gov. Code §82016.)

The adoption of Regulation 18521.5, therefore, would deter the type of ongoing collaboration on public issues between citizens groups and elected officials contemplated by the Court in Citizens to Save California.

Furthermore, there is nothing in the Act which supports the Commission's authority to restrict candidates to controlling only primarily formed ballot measure committees. The Act clearly anticipates two types of ballot measure committees—primarily formed and general purpose. Statutory definitions are clearly stated. The term "committee" is precisely defined to include all "persons" who receive contributions of \$1,000 or more in a year. The term person is defined to include "individuals." Thus, all persons under the Act, including candidates, may establish either type of ballot measure committee. The Act does not permit the Commission to restrict candidates to controlling one type of committee while permitting all other persons to establish either type. Such a regulatory restriction exceed the Commission's authority and is contrary to clear statutory provisions.

II. Adoption of Proposed Regulation 18521.5 Violates the Constitutionally Protected Free Speech and Association Rights of Candidates related to Issue Advocacy

In the hierarchy of protected constitutional rights, free political speech and association are among those required to be most highly safeguarded by our public institutions. Recognizing the importance of free speech and association with regard to public issues, the U.S. Supreme Court has found that "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression." (Citizens Against Rent Control (1981) 454 U.S. 290, 298.)

Because the proposed regulation impairs fundamental freedoms of speech and association by limiting the ability of candidates to participate in ballot measure advocacy, the regulation is most likely subject to exacting judicial scrutiny, a test the regulation would almost certainly fail. However, the regulation also fails to satisfy even the "less rigorous scrutiny" applied by courts to test the validity of limits on contributions to candidate campaigns. (Citizens for Clean Government (2007 9th Cir.) 474 F.3d 647, 650-651.) Using the less rigorous scrutiny applied on

candidate contributions, as pointed out below, leads to only one conclusion—the regulation is constitutionally flawed.²

Less rigorous constitutional scrutiny requires the government to demonstrate that the contribution limits imposed are closely drawn to match a sufficiently important government interest.

A. Does Regulation 18521.5 Serve a Sufficiently Important Government Interest?

The government has a sufficient state interest in imposing contribution limits if it can demonstrate that the purpose of the limits are to prevent corruption or the appearance of corruption in the political process. Conjecture and hypothesis of corrupt motives alone, however, are inadequate to carry the government's First Amendment burden to uphold limits on contributions. (Citizens for Clean Government (2007 9th Cir.) 474 F.3d 647, 653.) To meet the burden of demonstrating its state interest, the government must offer empirical evidence that overcomes any evidence to the contrary. (*Id.*)

In Citizens for Clean Government, the Ninth Circuit Court of Appeals considered to what extent the City of San Diego's imposition of contribution limits on candidate recall committees were based on a sufficient government interest. The City's stated purpose in enacting the ordinance was "to avoid the corruption or the appearance of corruption brought about when candidates for elective City office accept large campaign contributions." (Citizens for Clean Government 474 F.3d at 853.) In rejecting the City's purported rationale for the contribution limits, the Court found that "hypotheticals, accompanied by vague allusions to practical experience," without more, did not demonstrate a sufficiently important government interest to uphold the contribution limits. (*Id.* at 854.)

Here, like in Citizens for Clean Government, the Commission fails to proffer any evidence that contributions to candidate controlled ballot measure committees are the basis for quid pro quo arrangements or corrupt transactions, motives, or appearances.

In its staff analysis supporting adoption of 18521.5, the Commission refers vaguely to its belief that elected officials who accept contributions for ballot measure advocacy "may feel some sense of gratitude to persons who play major roles in funding their political activities . . . that may shade into a sense of 'obligation.'" (FPPC Staff Analysis, Adoption of Regulation 18521.5 (Agenda Item 16), December 11, 2008 Meeting, p. 2.) The staff analysis also refers to findings and declarations contained in the Political Reform Act which say that "large

² There appears to be no controlling legal authority that conclusively sets forth the level of constitutional scrutiny applicable to government imposed contribution limits on candidate controlled ballot measure committees. In imposing a preliminary injunction on FPPC Regulation 18530.9, the Superior Court in Citizens to Save California determined that less rigorous scrutiny was the appropriate constitutional measure. (Citation omitted.)

contributions from lobbyists and organizations” give these entities disproportionate influence over governmental decisions. (See Gov. Code §81001(c).)

The Commission’s reliance on general statements that the regulation is aimed at curbing corruptive purposes and its failure to establish any factual or evidentiary record of corruption resulting from contributions to candidate controlled ballot measure committees demonstrate that the regulation is not justified by an important government interest sufficient to withstand constitutional scrutiny.

The staff memorandum suggests two other governmental interests to justify its prohibition on candidates’ ability to control general purpose committees. The first is to prevent candidates running from “surrogate campaigns for elective office.” The staff cites the 2003 recall election and the use of a candidate controlled ballot measure to oppose Proposition 54. Commission staff not only fails to show how the proposed regulation restricting candidates to primarily formed committees would serve the purpose of preventing “surrogate campaigns,” it also fails to point out that the Proposition 54 committee was primarily formed—something the regulation specifically allows.

The staff also suggests that the regulation will provide “fuller and more timely disclosure than general purpose committees.” However, staff fails to explain how that would happen. In reality, general purpose committees are subject to many of the same disclosure requirements imposed upon primarily formed committees and, in some instances, more disclosure. For example, a general purpose committee making expenditures of \$1,000 or more in support or opposition to a state ballot measure during the final ninety days of an election must file reports within 24 hours disclosing the nature of the expenditures as well as the most recent contributors to the general purpose committee. In contrast, primarily formed committees need only disclose contributions received. Whether “fuller and more timely” disclosure results from the regulation is not clear at all.

In any event, preventing “surrogate campaigns” and providing for “fuller and more timely disclosure” are not governmental interests justifying the restrictions imposed by this regulation and clearly could be accomplished with less restrictive measures.

B. Is Regulation 18521.5 “Closely Drawn”?

Even if Regulation 18251.5 is determined to be supported by a sufficiently important government interest, it must be closely drawn to match that interest. The Regulation is easily shown not closely drawn.

- 1) Regulation 18521.5 is not closely drawn because there is no viable connection between the regulation and corruption prevention

To the extent that Regulation 18521.5 will prohibit contributions to candidate controlled ballot measure committees only before conditions exist allowing a candidate to establish a primarily formed ballot measure committee, the Regulation will not meaningfully prevent candidate corruption or quid pro quo arrangements.

If the regulation is adopted, candidates will continue to be able to control primarily formed ballot measure committees and would be permitted to receive unlimited contributions from the same pool of contributors as a general purpose committee. For example, if Regulation 18521.5 is adopted, a candidate would be prohibited from accepting a \$25,000 contribution from Contributor X in the absence of a specific ballot measure. However, if on the next day the candidate submits a measure for title and summary to the Attorney General, he or she would be authorized to establish a committee and accept the \$25,000 contribution from the same Contributor X.

It is difficult to see how the submission of a measure for title and summary -- or any of the other conditions imposed by 18521.5 on a candidate's ballot measure fundraising -- would make the candidate any less subject to improper motives or corruption. The impact of the regulation to prevent corruption would not, therefore, be sufficiently tailored.

- 2) Regulation 18521.5 is not closely drawn because it impedes a candidate controlled committee from engaging in effective advocacy without a significant anti-corruption benefit

Under the regulation, non-proponent candidates would be prohibited from raising funds and forming a primarily formed ballot measure committees until one of the pre-conditions set forth under the regulation have been met (i.e. submission of a measure to the AG for title and summary). This limitation has the effect of giving a substantial fundraising advantage to non-candidate controlled ballot measure committees who remain free to raise unlimited contributions, unrestrained by time, into general purpose committees.

The extraordinary adverse consequences imposed by the regulation on a candidate's ability to raise ballot measure contributions are disproportionate to the relatively limited impact the regulation would have on preventing candidate corruption, the appearance of corruption, or avoidance of existing contribution limits.

- 3) Regulation 18521.5 is not closely drawn because it chills the associational rights of candidates and those directing a committee who would otherwise desire to consult with them

As previously discussed, the fundraising limitations contained in Regulation 18521.5 would impose a significant chilling effect on the ability of candidates to meaningfully participate with non-candidate citizens regarding the activities of general purpose ballot measure

committees. Such a chilling effect would arise from a concern that the candidate's association with the general purpose committee would restrain its ability to raise funds outside the temporal limits imposed by Regulation 18521.5.

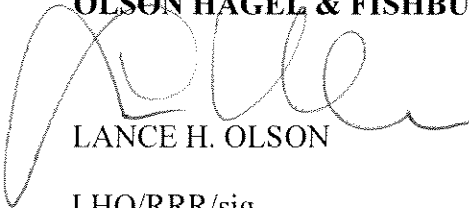
Such a far-reaching impact on the associational rights of candidates is not closely drawn to satisfy the regulation's marginal impact on abating corruption.

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No doubt the Commission is authorized to adopt regulations imposing restrictions on the use of funds held by candidate controlled ballot measure committees, whether primarily formed or general purpose. The Commission's interest in making certain such funds are not used to advocate the election of the controlling candidate appear justified to prevent circumvention of the Act's contribution limits. However, the approach taken in proposed Regulation 18521.5 goes too far.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



LANCE H. OLSON

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